Fairfax Hospital, a Division of Inova Health Systems and Fairfax Health System, Inc. *and* District of Columbia Nurses Association, American Nurses Association. Cases 5–CA–20387, 5–CA–20468, 5–CA–21042, and 5–CA–21048

January 29, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On June 4, 1992, Administrative Law Judge Benjamin Schlesinger issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the General Counsel filed a cross-exception and a supporting brief. The Respondent filed reply briefs.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs,[2] and has decided to affirm the judge's rulings, findings,[3] and conclusions as modified[4] and to adopt the recommended Order.[5]

We agree with the judge's finding that the discharge of Kathryn (Kitty) Richardson violated Section 8(a)(3) and (1) of the Act. We do so for the following reasons.

The credited facts, which are more fully set out in the judge's decision, are as follows. On March 7, 1990, nurse Kathryn Richardson, while in the break room during her break, engaged in a discussion with her supervisor, Terri Booth. Nurse Linda Ensign heard the entire conversation and nurse Janet Steuber heard part of the conversation. In what the judge described as ''a heated discussion,'' Richardson protested the Hospital's posting and distributing its antiunion literature while prohibiting union supporters from posting and distributing union materials.

The poster and flyer, which were the immediate cause of the dispute, described an incident in which a patient on his way to surgery allegedly was told that he would not receive good treatment because his wife had refused to support the Union. During the conversation Richardson had challenged the truthfulness of the literature, stated that in all her years of nursing she had never seen conduct such as that described in the literature, and questioned how Booth could believe such a thing. Booth commented that the hospital's posting was unpleasant, but stated that ''you better get used to it because there will be a lot more of these things coming.'' Richardson replied that Booth could expect ''retaliation.'' Booth reported the incident to her supervisors. Richardson was discharged the next morning.

The Respondent contends that Richardson was discharged for threatening Booth with ''retaliation.'' Mary Jane Mastorovich, Respondent's assistant administrator for medical, surgical, critical care and operating suite nursing, testified that the decision to discharge Richardson was made on the afternoon of March 7, 1990, the day the incident occurred, and was made in consultation with Toni Ardabell (director of medical, psychiatric, and dialysis nursing), Charles Barnett (chief operating officer of Fairfax Hospital), Brent Miller (vice president of human resources, Inova Health Systems), and legal counsel. Ardabell corroborated Mastorovich's testimony that the decision to terminate Richardson occurred on March 7. When Richardson reported to work on the morning of March 8, Ardabell discharged her.

[1] As requested by the General Counsel in a motion filed October 21, 1992, alleging failure of service by the Respondent, we note that, under Sec. 102.47 of the Board's Rules and Regulations, copies of all motions in proceedings before the Board must be accompanied by an affidavit of service upon the parties.

[2] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[3] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent asserts that the judge's decision is biased. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

We note that the judge mistakenly stated that Vicki Herman testified. We correct this inadvertent error but find that it makes no difference in the result in this case.

We agree with the judge that an employer may lawfully campaign during employees' nonbreaktime and in working areas even though it prohibits employees from doing so. Thus, we do not rely on any implication in pars. 33 and 59 of the judge's decision that the Respondent's exercising its right to solicit and distribute flyers directly affects the Union's right to solicit and distribute.

[4] The General Counsel has excepted to the judge's failure to find that the Respondent violated Sec. 8(a)(3) as well as Sec. 8(a)(1) of the Act by requesting its nurses to remove their union buttons. The General Counsel bases his argument on the judge's finding that the Respondent's requests to its nurses to remove their union buttons were a form of discipline. We find that the requests to nurses Jan Hylton, Catherine Meister, Elaine Muller, and Joan Whalen, which were documented in the Respondent's files, violated Sec. 8(a)(3). We find it unnecessary to pass on whether the request to nurses Carol Awad, Lynn Baker, Janet Courtemanche, Brenda Craft, and Tina Price to remove their union buttons violated Sec. 8(a)(3) because these violations, if found, would be cumulative and would not materially affect the Order.

[5] The judge's recommended Order provides that the Respondent shall offer immediate and full reinstatement to discriminatee Kathryn Richardson. The Respondent argues that Richardson should not be reinstated because, inter alia, she expressed disloyalty to the hospital in a televised interview after her discharge. We leave it to the compliance stage of this proceeding to determine the effect, if any, of Richardson's alleged misconduct after her discharge.

We find that Richardson was engaged in union activity during this conversation.[6] We also find that under the circumstances presented here, her entire conduct, including her statement about ''retaliation,'' was protected. To be sure, an employee may lose the protection of the Act by threatening to engage in misconduct in retaliation for what is perceived as provocative (and even unlawful) conduct by an employer. But Richardson's reference to ''retaliation,'' uttered in a heated exchange concerning the Respondent's unlawful enforcement of its no-solicitation/no-distribution and bulletin board rules, was inherently ambiguous. It could have meant no more than that the Union would respond in kind to the Respondent's propaganda. Unless accompanied by threats of egregious or outrageous conduct, Richardson's oblique statement was not unprotected.[7]

The Respondent admits that it discharged Richardson for her use of the word ''retaliation,'' activity which we have found to be protected by the Act. Accordingly, in discharging Kathryn Richardson because of the ''retaliation'' statement, the Respondent discharged her for her protected union activity in violation of Section 8(a)(3) and (1) of the Act.[8]

Assuming arguendo that Richardson's conduct in using the word ''retaliation'' was not protected, we would still find that her discharge was unlawful under *Wright Line*.[9]

The General Counsel has established a prima facie case that the Respondent discharged Richardson for her union activity. It is undisputed that Richardson was known to the Respondent as a leading union advocate. She was a member of the Fairfax Professional Nurses Association steering committee, had handed out union leaflets in front of the hospital to members of management as well as to fellow employees, was one of six nurses whose picture and interview appeared in a

[6] The Respondent in its brief argues that Richardson's conduct was not concerted. Because Richardson was engaged in union activity, we find it unnecessary to rely on the judge's finding that she was engaged in ''concerted'' activity. *Salem Leasing Corp. v. NLRB*, 774 F.2d 85, 89 fn. 8 (4th Cir. 1985).

We do not rely on the judge's statement, in par. 74 of his Decision, that the literature that the Respondent posted and distributed was untruthful. The Respondent correctly states (at least in the context of this case) in its brief that ''the truth or falsity of the [literature] is irrelevant to the issue of whether Ms. Richardson was discharged for her union activity.''

[7] See generally *Brunswick Food & Drug*, 284 NLRB 663, 665 (1987), enfd. mem. 859 F.2d 927 (11th Cir. 1988); *Postal Service*, 250 NLRB 4 (1980); *NLRB v. Cement Transport*, 490 F.2d 1024, 1029–1030 (6th Cir. 1974), cert. denied 419 U.S. 828 (1974).

We find that *Atlantic Steel Co.*, 245 NLRB 814 (1979), on which the Respondent relies, is distinguishable from this case. In *Atlantic Steel*, the Board deferred to an arbitrator's decision that the respondent had lawfully discharged for insubordination an employee who directed an obscenity to his foreman. The majority opinion emphasized the fact that the obscenity was unprovoked and was made on the production floor during the employee's working time. In addition to the procedural distinctions between Board review of an arbitral award under *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and Board review of an administrative law judge's decision, *Atlantic Steel* is factually distinguishable from the present case. Richardson, the discriminatee here, was in the break room on her own time, engaged in a discussion with her supervisor regarding union-related materials when she spoke of ''retaliation.''

[8] Member Oviatt finds it unnecessary to decide whether Richardson's retaliation statement was itself protected. He relies instead on the pretextual nature of the discharge. Thus, Member Oviatt notes that the General Counsel made a strong prima facie case for finding that the Respondent violated Sec. 8(a)(3). Member Oviatt observes that (1) Richardson had 27 years of experience, over 15 of these at the Respondent; (2) she had consistently excellent evaluations at the Respondent, was strongly recommended for promotion to the Clinical Ladder, and her promotion to Clinician III was approved; (3) Mastorovich, the supervisor who approved Richardson's discharge, had never before received a negative report about her work; (4) despite the Respondent's particular difficulty in filling all its registered nurse positions, its positive discipline system designed to give an employee an opportunity to improve her behavior before discharge, and the lack of specific evidence that a registered nurse had ever been discharged for just *one* incident of misconduct without prior warning or counseling, Richardson was summarily discharged just on the basis of her retaliation remark; (5) although there is ample record evidence, and the judge found, that under its disciplinary rules Respondent investigates alleged misconduct before imposing discipline, including speaking to the employee involved, Supervisor Ardabell recommended, and Mastorovich decided, to discharge Richardson without first speaking either to Richardson or to Steuber, another employee present during the Booth-Richardson conversation, and without Ardabell's even reviewing Richardson's personnel file; (6) the Respondent knew that Richardson was a leading union proponent who had been pictured and quoted in a union leaflet, herself had leafletted the Respondent's supervisors, and had questioned the Respondent's managers concerning the Union; (7) there is substantial evidence of the Respondent's antiunion animus, including numerous violations of Sec. 8(a)(1) and (3), among them its selective and disparate enforcement of its rule on the use of bulletin boards; and (8) Richardson was discharged shortly after she objected to her supervisor about the fairness of the Respondent's antiunion campaign, including the inability of prounion nurses to post notices on the bulletin board.

Member Oviatt observes that the Respondent's supervisors testified that Richardson was discharged just for her remark concerning retaliation. He notes, however, that the judge discredited these supervisors on the basis of their demeanor—the judge found that they were not sincere and that in fact they seized on the retaliation remark to rid themselves of an outspoken union supporter. The judge also found that, although Booth was upset, this stemmed from the substance of her entire conversation with Richardson, during which Richardson questioned Booth's single-minded loyalty to management. The Board will not overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence establishes that those resolutions are incorrect. *Standard Dry Wall Products*, supra; see *Abbot Laboratories v. NLRB*, 540 F.2d 662, 667 (4th Cir. 1976). In Member Oviatt's view, the evidence will not support a reversal of those findings. Thus, like the judge, Member Oviatt is constrained to find that the asserted reason for Richardson's discharge—her retaliation remark—was pretextual, and that the real reason was her union activity. Member Oviatt emphasizes that his findings in this case should not be interpreted to mean that an employer could never summarily discharge an employee for sugggesting ''retaliation.'' As Member Oviatt has concluded, however, the Respondent failed in its proof that the retaliation remark was the real reason for the discharge.

[9] 251 NLRB 1083 (1980), enfd. as modified 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

union flyer, and her discharge was precipitated by a discussion of the union organizing compaign.

There is ample evidence of antiunion animus in the numerous 8(a)(1) violations which the Respondent committed in its attempts to discourage the nurses from organizing. Specifically, we find animus in the Respondent's disparately enforcing its bulletin board rule, in promulgating and disparately enforcing its mailbox rule, in confiscating union literature from employee mailboxes, in promulgating and disparately enforcing its personal appearance policy to prohibit the wearing of union buttons, in promulgating and disparately enforcing its rules restricting access of off-duty employees, in engaging in surveillance of its employees' union activities, as well as in disparately enforcing a no-solicitation/no-distribution rule.

Once the General Counsel has established that the Respondent knew of the discharged employee's union activity and that the Respondent has demonstrated antiunion animus, the burden shifts to the Respondent to show that it would have taken the same action in the absence of union activity. The Respondent has failed to do so.

Respondent's proffered rebuttal was that it had a good-faith belief that Richardson was threatening her supervisor with personal harm when she spoke of ''retaliation.'' The Respondent's witnesses testified that they understood the word ''retaliation'' to mean that Richardson threatened Booth with physical harm. The Respondent argued that Richardson's statement was so threatening as to amount to an assault on her supervisor, thus justifying an immediate dismissal under the Respondent's personnel policy.

The judge, however, discredited the Respondent's witnesses' testimony, including testimony that Booth was hysterical because of Richardson's statement, and rejected this argument. In this connection, the judge specifically stated that the Respondent's witnesses ''were not sincere'' and ''were not candid.'' Thus, the judge determined that the Respondent's witnesses did not have a good-faith belief that Richardson intended to harm Booth. The judge reasonably inferred that Booth was upset, not because of any threat, but because of the substance of the entire conversation. In these circumstances, the judge was warranted in concluding that the Respondent seized on ''the word 'retaliation' to concoct a legitimate reason for discharging [Richardson], whereas all that was really involved was a deeply felt disagreement arising from the Hospital's opposition to the Union's attempt to organize the nurses.''

Further, as the judge noted, the Respondent failed to follow its own progressive discipline policy in its discharge of Richardson. The Respondent's written policy generally provides for factfinding, oral and written reminders, and a day of decision-making leave prior to discharge. Even for serious offenses warranting immediate discharge, the policy provides that the employee will be suspended while the facts of the offense and the appropriate discipline are fully investigated. The Respondent clearly did not fully investigate this incident before deciding to discharge Richardson. The Respondent interviewed nurse Linda Ensign, who heard the entire conversation and testified, inter alia, that she was surprised that Booth thought Richardson's statement was threatening. Nurse Janet Steuber testified that she was in and out of the break room during the March 7 incident, that she heard part of the conversation including the comment about ''retaliation,'' but that no one in hospital management asked her about the conversation prior to Richardson's termination, or even after Richardson's discharge when she told Booth and Ardabell that she had heard the statement and it was not threatening. Finally, the Respondent did not interview Richardson herself before making the decision to terminate her. This failure to investigate casts still further doubt on the Respondent's contention that it discharged Richardson because of its good-faith belief that she had threatened her supervisor with personal harm.

Respondent's witnesses testified that there are always positions open for registered nurses at Fairfax Hospital, that the hospital attempts to keep experienced nurses, and has even established an RN Retention Committee in its endeavor to do so. Kathryn Richardson, a nurse for 27 years, had been employed at Fairfax Hospital for over 15 years. She was certified in nephrology and hemodialysis. Richardson's evaluations dating back to 1976 were entered as exhibits in this proceeding. Her evaluations are consistently high and replete with references to her ''superior'' and ''outstanding'' performance, comments about her participation in hospital in-service and orientation programs, and a 1988 notation that she was nominated for the Virginia Nurses Association Outstanding Nurse of the Year Award because of her dedication to her profession. Yet, despite Richardson's years of efficient and dedicated service, and despite the hospital's ongoing need for experienced nurses, the Respondent precipitously discharged her.

We conclude that the Respondent has failed to show that it would have discharged Richardson in the absence of her union activity. We agree with the judge that in discharging Kathryn Richardson, the Respondent violated Section 8(a)(3) and (1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Fairfax Hospital, a division of Inova Health Systems and Fairfax Health System,

Inc., Fairfax, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Carol A. Baumerich, Esq., and *Angela S. Anderson, Esq.*, for the General Counsel.

John G. Kruchko, Esq., Kathleen A. Talty, Esq., and *Steven W. Ray, Esq. (Kruchko & Fries)*, of Vienna, Virginia, for the Respondent.

Douglas Taylor, Esq., of Washington, D.C., for the Charging Party.

DECISION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BENJAMIN SCHLESINGER, Administrative Law Judge. The consolidated complaint in this unfair labor practice proceeding alleges that, when District of Columbia Nurses Association, American Nurses Association (Union), began to organize the registered nurses[1] employed by Fairfax Hospital (the Hospital), Respondent instituted or began to enforce no-solicitation, no-distribution, no-access, no-buttons, and no-posting rules, some disparately, in order to prevent and frustrate the Union from organizing. When nurses violated the rules, they were warned or otherwise disciplined. The complaint also alleges a variety of other violations of the National Labor Relations Act, all of which Respondent denied.[2]

Jurisdiction is conceded, but the proper party respondent is not. The first complaint named the Hospital as the respondent, alleging that it was a Virginia corporation. The answer denied that the Hospital was a corporation, but alleged, and I so conclude, that the Hospital was an unincorporated division of Fairfax Health System, Inc. (System), a Virginia nonstock corporation; that it operated a private nonprofit community health care facility providing medical and professional care services to the general public in Fairfax, Virginia; and that during the 12 months preceding May 1, 1990, it derived gross revenues in excess of $250,000 and purchased and received goods, materials, and services valued in excess of $10,000 directly from points outside Virginia. The amended complaint continued to allege only the Hospital (not as a division) as the respondent, and the Hospital took the same position in reply. Only during the hearing did the General Counsel agree to amend the name of the Hospital, as the Hospital contended.

Late in the hearing, the Hospital called Brent Miller, the vice president, human resources, of Inova Health Systems (Inova), to testify about certain facts involving his participation in the decision to photograph a certain union demonstration and to discharge nurse Kathryn (Kitty) Richardson. Because Miller was not employed by System, but was intimately involved in the Hospital's decision to conduct the surveillance and to discharge Richardson, the counsel for the General Counsel justifiably inquired of Miller as to how he became involved in these matters. Miller stated that the Hospital was a division of Inova, a Virginia corporation, and not System, of whose existence he professed ignorance. Counsel then moved to amend the consolidated complaint, a motion which I granted, to allege that Inova and System constituted a single employer within the meaning of the Act and were doing business as Fairfax Hospital; and that wherever the complaint made reference to Respondent, it meant these two entities. However, no motion was made to amend the caption, which still named the Hospital, as a division of System. It was only a result of the General Counsel's unopposed motion to amend the caption, as well as other portions of the official transcript, made after the hearing terminated, and hereby granted, that the caption now appears in its present form.

I find, but not without doubt, that the Hospital is a division of both Inova and System. Respondent's answer admitted that the Hospital was a division of System, and Miller stated that the Hospital was one of four hospitals which comprised the hospital division of Inova. Both Respondent's counsel and Miller are in a position to be fully aware of what the facts are. It was incumbent on Respondent to clear up whatever conflict might exist between the answer and Miller's testimony. Respondent offered no help. Although it might well be that the caption incorrectly designates the Hospital's affiliation with both, particularly System, the error, if any, is of the Hospital's making. The caption, describing the Hospital's status, is supported by this record.[3]

I am unclear what the General Counsel believes is added by the allegation that both Inova and System, doing business as the Hospital, constituted a single employer. If the Hospital is a division of both, both are doing business as the Hospital and are responsible for any relief granted herein. At least, that is my intent. That finding is based almost wholly on the admission in the answer. Otherwise, except for some miscellaneous facts, the record supports the finding that Inova is the sole employer of the Hospital's employees. Inova owns the Hospital, at least, so testified Miller, contrary to what the answer admits. All employees' paychecks bear Inova's name, as well as the Hospital's. Many administrators of the Hospital have comparable positions within Inova's structure. Inova made the rules and policies (approved by Mike French, Inova's senior vice president) affecting labor relations which were binding on the Hospital and are the bases of many of

[1] All the nurses referred to herein are registered nurses.

[2] The relevant docket entries are as follows: The Union filed its charge in Case 5–CA–20387 on April 17, 1989, and amended it on April 27 and November 17. It filed its charges in Case 5–CA–20468 on May 19, 1989, in Case 5–CA–21042 on March 13, 1990, and in Case 5–CA–21048 on March 15, 1990. The complaint issued on December 4, 1989, and was amended on May 1, 1990, and at the hearing. The hearing was held in Fairfax, Virginia, on various dates between May 15, 1990, and May 7, 1991.

[3] Respondent complains that the amendment of the complaint was extremely prejudicial and violated fundamental concepts of due process. As explained in the text, most of the information about the relationship of Inova to the Hospital was given by Miller, who was called as a witness by Respondent late in the hearing. As a result primarily of his testimony, the counsel for the General Counsel promptly moved to amend the complaint. In granting the amendment, I advised Respondent specifically that, in the event that it was unprepared to meet the allegation, it could apply to me for additional time to elicit testimony. Furthermore, after my ruling, there was a lengthy delay in the hearing, prompted by Respondent's failure to comply with a subpoena duces tecum which Respondent had unsuccessfully moved to quash. Clearly, Respondent had a right to contest that ruling in an enforcement proceeding in the Federal district court, as it did, but there was a 6-month hiatus in the hearing, during which it should have had ample opportunity to review its legal position and present its opposition to the amendment. I find that Respondent was not prejudiced, and its right to due process was not violated.

the principal allegations in the complaint. Inova's policies require that the final authority for the discipline of nurses rests with Inova's president; and the discharge of Richardson was approved by Miller, who is not on the staff of the Hospital.

Other than some common officers, the record fails to define the function of System; but there is at least enough to show that System was not an innocent bystander and should not be exonerated from any liability which results from this proceeding. French, Inova's senior vice president, is its president. The Hospital's administrator, Everette Devaney, who was described by one witness as the ''head'' of the Hospital, is senior vice president of System and an employee of Inova. He reports to French, as do other members of the management of the Hospital, but the record does not reveal whether he reports to French in his capacity as an officer of System or Inova, or both.

Whether employers are single employers involves the examination of four factors: ''(1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership.'' *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982). On the basis of the lack of evidence of the functional integration of operations of System and Inova and, particularly, what System does, I conclude that there is no proof of the relationship between System and Inova, and I find that they do not constitute a single employer; but I find that the Hospital is a division of both. I conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. I also conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

In the summer of 1988 the Union began an organizing campaign, which led to the formation of the Fairfax Professional Nurses Association (FPNA), with a steering committee of nurses from various units in the Hospital. FPNA contacted the Union and affiliated with it. Respondent found out about the organizing campaign, and, in an effort to counter the Union's meetings, leaflets, and literature, some placed in the employees' mailboxes, others distributed in the parking lots, cafeteria, and lounges during off-duty time, Devaney held meetings with the nurses to discuss their concerns and issued ''Action Reports'' describing these meetings. These meetings continued, as did the Union's efforts to organize, into 1989, and during this period Respondent pursued a policy of attempting to silence the Union's message or of substantially interfering with its ability to promote itself, at least on the campus of the Hospital.

The first way that Respondent did this was by enforcing the following rule, in effect since 1984, to prohibit the posting of union literature on its bulletin boards:

STATEMENT

Bulletin boards located at various places throughout the organization are for the official use of Fairfax Hospital Association. However each facility may designate one bulletin board for employees' use within stated perameters.

GUIDELINES

A. Bulletin Boards: All bulletin boards of the Association are restricted to the posting of Association-designated documents and notices.

B. Employee Bulletin Board: Each facility may designate one bulletin board for the use of employees. Employees will be permitted to post personal announcements, such as car-pool information, for-sale advertisements, and apartment sharing. Commercial notices, for example, advertising for real estate agencies, political notices, church events, and other such solicitations are prohibited.

Items to be posted must be delivered to the facility personnel office for approval prior to posting. The size of the announcements may not exceed 3'' x 5.'' Notices may be posted for a period not exceeding one calendar week. Notices found on the Employee Bulletin Board without approval of the personnel office will be removed immediately.

Posted material found anywhere other then the designated bulletin board will be removed immediately.

C. *Special Requests*: Special requests for authority to post notices of events in the community by charitable groups, various professional associations and the like shall be submitted to the Director of Personnel. The Director of Personnel will convey the request to the facility Vice President/Administrator for consideration. Normally, only those requests to post notices which involve health, medical, patient care or similar subjects may be approved.

In general, an employer has complete control of its bulletin boards and the items, if any, that it will permit to be posted on them. There is no statutory right of employees to use an employer's bulletin boards. *Honeywell, Inc*., 262 NLRB 1402 (1982), enfd. 722 F.2d 405 (8th Cir. 1983); *Container Corp.*, 244 NLRB 318 fn. 2 (1979). The complaint does not allege that Respondent's rule is illegal, nor does it allege that it was adopted for the specific purpose of thwarting any future union activities. What it does allege is that the rule was maintained and enforced selectively and disparately because Respondent removed union-related solicitations and distributions, while it permitted the posting of nonunion-related solicitations and distributions for long periods of time, without the Hospital's approval and without compliance with any size requirements.[4]

The record amply supports the complaint. Nurse after nurse testified in relentless detail about the locations of the bulletin boards and what was posted on them. The Hospital's units—two on each floor of the Hospital's main building, the Tower Building, as well as other units—had as many as nine bulletin boards, and it is not particularly helpful or interesting to recite the locations of the boards or their general purpose. What is important is that union-related literature, either

[4] The General Counsel repeatedly argues in his brief that Respondent posted its own antiunion posters on the same bulletin boards that the employees were not allowed to post their prounion material. The point is irrelevant. Respondent had the right to post its literature without affording a similar right to its employees. *Summitville Tiles*, 300 NLRB 64 (1990).

announcements or propaganda, was removed from the bulletin boards within minutes or hours after posting. What was not removed from these same bulletin boards was not only Hospital-related material, which no one questions was entitled to remain, but other kinds of posters, notices, and writings which the Hospital had never objected to before the Union's organizing drive began and much of which was still posted even at the time of the hearing in this proceeding, such as birth announcements, cake sales, order forms for Girl Scout cookies and Tupperware, pizza-delivery and Chinese-food notices, baby shower invitations (where each nurse, and even supervisor, who planned to attend would sign the sheet and indicate what food she or he was going to bring, so that others would not bring the same food), announcements, happy hour parties, get-togethers, going-away parties, retirement parties, Christmas parties, comic strips, cartoons, posters for the Gold Cup horse race in Virginia, shoe sales, car sales, real estate rentals and sales, solicitations for ''Sunshine Funds,'' postcards from staff who were on vacation, and thank-you's from patients. Some of these remained on the bulletin boards for days, some for weeks, and some even for months. Many far exceeded the size limitation imposed by the Hospital's rule, and the requirement of the Hospital's advance permission seems to have been totally ignored. Permitting the posting of all these personal items, while not permitting and removing only union-related material, violates the Act. *Honeywell, Inc*., supra; *St. Vincent's Hospital*, 265 NLRB 38 (1982).

Among Respondent's defenses is that, for the most part, its rule was enforced. Indeed, some nursing coordinators testified that they always removed all material that was not Hospital-related, a rather curious admission in light of the rule's permission to post ''personal announcements.'' In fact, in some of the Hospital's wings, there were bulletin boards labeled ''Thank You's,'' ''Good News Grapevine,'' and ''Personal,'' just for the posting of the kind of material that the supervisors at the hearing were insisting that they were removing. I do not credit them. I find generally that the Hospital's witnesses supported whatever they thought the Hospital wanted to hear, rather than testifying truthfully.

In any event, most of the supervisors who testified that they enforced the rule, and the rule was not enforced uniformly throughout the Hospital, did not enforce it until the fall of 1988, after the nurses began to look to the Union for help. Until then, the rule had been almost completely ignored. I credit those nurses who testified that they did not know about the above-quoted rule because, for years, they had posted material without permission from Respondent's administrators and managers and their material remained posted on the bulletin boards until it was so stale that it was removed by the nurses or their supervisors. It was only after the organizing drive was discovered that Lloyd Greene, the Hospital's assistant administrator for human resources, met with the supervisors and supervisory nurses and advised them to enforce the bulletin board rule. A number of nurses testified that the rule was first posted or inserted in the nurses ''Read'' file or announced at meetings of nurses only after the organizing drive began. Thus, even though the restriction on posting notices preceded the Union's organizing campaign, and even assuming that the rule was applied uniformly following the commencement of the campaign, Respondent's motive to enforce the rule was to stifle its employees' organizing activities and rendered the rule unlawful. *Ramada Inn of Fremont*, 221 NLRB 331 (1976).

But the rule was not applied uniformly. The instances testified to were no mere isolated exceptions.[5] Too many nurses testified about too many postings; and I credit all of their testimony. Some of the material that was posted is in evidence, and there are photographs of the bulletin boards—all offering indisputable evidence that non-Hospital-related material[6] was posted as a general course of conduct and that Respondent's supervisors permitted those postings and permitted them to remain, while removing all union-related material. No one testified that union material had been permitted to remain, as did all the other material. Respondent applied its rule disparately, on purpose. It took away the right of the nurses to communicate only about the Union, while it permitted the nurses to communicate freely about parties and food and vacations. The rule which required permission of the Hospital was never generally enforced, nor were any of its other prohibitions. Even when Respondent began to enforce the rule, albeit partially, the offensive material was not wholly eliminated from the nurses attention. For example, instead of allowing a notice of a shower to be posted, the notice was merely removed from the bulletin board but allowed to remain on the table in the nurses lounge, within feet of the bulletin board from which it had been removed. To the contrary, union propaganda left on tables in lounges was uniformly and immediately removed.

Accordingly, I do not agree that the failure to enforce the rule was negligible and isolated in light of the rule's permission to post ''personal announcements,'' a defense which appears illusory. If the Hospital wished to bar personal notices, it was obliged to enforce that rule and was obliged to have sufficient personnel monitor the boards to make sure that the prohibition was applied in an even-handed manner. The rights guaranteed employees by the Act cannot be forfeited by their employer's inaction or inattention. Nor do I agree with Respondent's contention that the announcements of ''social unit-related activities'' should be disregarded as evidence of disparate activity because they ''have been shown to have a positive effect on team building, thereby improving the rendition of patient care.'' Parties may be places where nurses may share or exchange their work experiences, but nurses may also do so at union meetings. There is no reason why an announcement of one is any more helpful or harmful to patient care than the other. I conclude that Respondent violated Section 8(a)(1) of the Act.

The complaint also alleges that the Hospital restricted the number of bulletin boards available for the employees to post

[5] Respondent contended throughout its brief that there should be no finding of certain unfair labor practices because the conduct complained of was too isolated or there were too few incidents of illegalities in a facility of the Hospital's size. I generally reject these defenses, first, because I find that the conduct was not isolated and, second, because all the conduct had a direct bearing on the nurses whose protected and union activities were being limited. In particular, the principal allegations have in common Respondent's attempt to discourage communications among the nurses. Evidence of any disparate treatment regarding any of the opportunities to communicate, whether by verbal solicitation, notices on bulleting boards, or leafletting by off-duty nurses, or by leaving a note in a mailbox, is material to all of the allegations.

[6] This finding includes materials advertising social functions, posted by professional associations.

their union literature, an allegation which makes little sense because an employer does not have to make any bulletin boards available to employees. What was litigated was Respondent's relabeling of a bulletin board allegedly to eliminate the only board in that area available for union material. Before November 1988, there had been only two bulletin boards, among many, which were labeled on the ground and basement floors in the Tower Building in the operating room area. One was labeled ''Personal'' and nurses used to be able to post their own private messages there. In November 1988, after union adherents had posted their first union literature, which was quickly removed, this bulletin board and others which had not been labeled were relabeled with plaques which read ''Official Minutes'' or ''Official Memos,'' ''Laser Updates,'' ''Educational Seminars,'' ''Educational Literature,'' and ''Quality Assurance.'' There was no longer a bulletin board labeled ''Personal'' and thus, according to the complaint, no longer a proper place to post union literature.

However, Respondent had never allowed union literature to be posted anywhere, and at best the proof shows only that Respondent removed a bulletin board where personal messages could be placed. On the other hand, at the same time, Respondent added two new boards in the basement and hallway leading to the basement nurses lounge. The first was labeled ''Stat Staff Messages'' and became the repository for the nurses social messages, but the nurses also posted whatever they wanted on the frames of other bulletin boards, as well as bathroom stall doors and doors leading into the lounges and in the stairway. Thus, the effect of the labeling of the other bulletin boards was offset by the addition of the new boards. There was no discrimination here, and certainly no discrimination because of the employees' union activities or activities protected by Section 7. I conclude that Respondent did not violate the Act in this respect and will dismiss this allegation.

In mid-February 1989[7] the Union prepared flyers announcing a union meeting to be held on February 23; and, a day or two before the meeting was to be held, nurse Kathleen Eisenhauer placed these flyers in the mailboxes[8] of the operating room nurses. They were removed by Operating Room Nursing Coordinator Rosalie Ewing, who advised that Eisenhauer was soliciting and that this type of material was not allowed in the hospital. If Eisenhauer had any questions, she should contact the Hospital's personnel office. About 10 days later, on March 3, Respondent promulgated the following new rule:

> The internal mailboxes for employees are the Hospital's property. These mailboxes are made available to facilitate in-house communication on matters directly related to Hospital operations and practice. Therefore, material concerning outside matters, such as picnics, fund raising, etc., may not be placed in the mailboxes.
>
> Only hospital-related material that a Department Head or his/her designee, places in the in-house mailboxes is permitted. Any written material that is not hospital-related or is placed in the mailboxes by someone other than a Department Director/Nursing Coordinator will be removed from the mailboxes. Any employee who is found to violate this policy will be subject to disciplinary action.

I reject Respondent's claim that the rule was not new. None of the nurses heard of or read the rule before, and Respondent never produced the prior rule. The practice of the employees before the issuance of the new rule was to use their mailboxes for any correspondence that they wished to share with others. That included union literature, one of which was disguised as a ''shopping spree,'' Christmas and birthday cards, thank you notes, invitations to showers and parties, telephone messages, Avon catalogues, correspondence from people on vacation, reminders for Girl Scout cookie sales, photographs, videotapes, raffle tickets, buttons, and cartoons. In addition, many nurses testified that they constantly received notices of course offerings, schedule changes, and correspondence and newsletters from other professional associations, such as the Association of Operating Room Nurses—none of which were ''directly related to Hospital operations and practice.'' Nor were they placed in the mailboxes, as the rule required, by the ''Department Head or his/her designee.'' Even after the rule was promulgated, the nurses continued to place many of these in the mailboxes; but the only items ever removed were union literature. (Some nurses testified, however, that, because of the promulgation of the rule and instructions given by their supervisors, they have not used the mailboxes to distribute union-related material.)

The complaint alleges that this rule was promulgated in order to discourage union and protected activities and was applied disparately. My conclusion is similar to my resolution of the complaint's bulletin board allegation. Respondent's rule was enforced as a direct result of the attempt by the employees to engage in union activity. Respondent feared that the employees would communicate with one another by notices on the bulletin board and wanted to stop that practice. Thus, the bulletin board rule was enforced to prevent the employees from posting any union-related notice in the Hospital. When the employees attempted to spread word of their organizing efforts by using the mailboxes, the Hospital learned that it had no rule preventing that practice; and so it promulgated the rule shortly after the Union's attempt to disseminate its notice of its upcoming meeting. The timing of the rule supports an inference that the real reason for the rule was an illegal one, to prohibit the dissemination of union material.

Greene's explanation of the reason for the rule's enforcement was hazy and unsatisfactory. He testified that many nursing coordinators and directors had inquired about what could appropriately be placed in the mailboxes. There was no explanation of what was bothering them, and it appears more than coincidental that the nurses had just recently begun their efforts to organize. The fact that Eisenhauer had attempted to inform her fellow nurses of a meeting must have been threatening. As a result, this new rule was publicized in a memorandum Greene addressed to all employees. The directors and nursing coordinators were required to post the memorandum, and the directors were ordered to remove from the mailboxes anything placed there in violation of the new

[7] All dates hereinafter refer to the year 1989, unless otherwise stated.

[8] The word ''mailbox'' in this discussion is used loosely. Many of the ''mailboxes'' were cubbyholes. Others were lateral letter files and manila file folders.

rule. Respondent's maintenance and selective enforcement of its new rule was thus disparate and violated Section 8(a)(1) of the Act. It follows that Ewing's confiscation of the union flyers from the mailboxes on February 21 or 22 also violated the Act.

Respondent claims that this violation cannot be remedied, because permitting the employees to place flyers in the internal mailboxes would violate the Federal Private Express Act, 18 §§ 1694, 1696. This is the first time that the Hospital had been worried about that act. Until the adoption of its rule, Respondent freely distributed its material in these mailboxes, and employees and professional associations distributed their material, too. Respondent was concerned not about the method of distribution, but the contents of what was being distributed. Furthermore, the record is barren of any evidence that, even if the Private Express Act applied, the Hospital operated an internal mail system within the meaning of that statute. *University of California v. Public Employment Relations Board*, 485 U.S. 589 (1988), dealt with a university's refusal to allow a union to use the internal mail system to send unstamped letters to certain of the university's employees. Here, however, certain employees were merely delivering leaflets by inserting them in open slots or in file folders and never sought to use any mail system. My recommended order will not, in any event, require Respondent to deliver anything. Respondent simply may not adopt rules to thwart union activity, and it must only afford the same rights to those who favor the Union as it does to all its other employees.

The complaint next alleges that nursing coordinator Sue Corbett violated Section 8(a)(1) in three respects when she talked with nurse Elaine Muller on February 23. Muller's testimony was as follows: Corbett told her that it had been reported to her that Muller had been passing out union literature, and Corbett accused Muller of putting union material in employees' lockers. Muller denied putting anything in lockers but admitted handing out an article from *American Journal of Nursing*, a professional journal. Corbett asked Muller why she would be interested in joining the Union. Muller replied that she was interested in seeing the nurses take charge of their own profession. Corbett asked, if Muller thought there were problems, why she needed to pay money to the Union and why she could not discuss the problems directly with the Hospital's administrators. Muller replied that the nurses were very busy in their profession and that the Union was the best organization to represent the nurses. In addition, Muller said that the administrators had been in charge of hospitals for the last 15 or 20 years; they had ended the employment of nurses aides and licensed practical nurses and expected nurses to do everything from nursing to paperwork and cleaning floors, whereas nurses should be at the bedside; and the only result of their administration was that capable nurses had left the profession. It was time for the nurses to do something about it. Corbett then asked why Muller thought that the operating nurses knew about what was happening ''over here in the building'' and then pointed her finger at Muller, saying: ''I'm warning you, you better be careful, I'm warning you, they know who you are and they're watching you.'' Muller said that she was not disciplined during this conversation. Later, however, on April 24, she was given a written warning for distributing union flyers in a parking lot and was told that she was in the second phase of Respondent's disciplinary procedure, because she had previously been warned on February 23.

The complaint alleges that the ''warning'' constituted both a warning of unspecified discipline and giving Muller the impression that her activities were being watched. Corbett specifically denied that she said the words attributed to her in the above quotation, but testified that she warned Muller for soliciting an on-duty staff nurse and distributing union material to that nurse at the nurses station. Corbett's testimony makes sense for two reasons: first, Muller seemed to know exactly what she was being warned about. She testified, in an answer that was not wholly responsive to the question posed: ''Well, I distinctly remember the incident she was referring to. I had been on 9 East and asked them to [read the article], that this was an interesting article from the AJN and asked them to read it.'' In a letter of May 3, Muller acknowledged that Corbett had ''accused [her] of passing union material while on duty.'' I find it improbable that Corbett should have warned her not about this incident, but about putting material in lockers. Muller did not testify that she engaged in any such conduct, and I have no basis for believing that Corbett should have accused her of anything other than what Muller appeared to admit, at least in part.

Second, the sequence and context of the alleged ''warning,'' as related by Muller, made little sense. Corbett had been talking about the knowledge of the operating room nurses, and that had nothing to do with a ''warning'' that people were watching Muller, construed by the General Counsel to be a creation of an impression of surveillance. I find that there was no such warning and thus no creation of an impression of surveillance. The only warning that was discussed was the warning about Muller's distribution of the magazine article. Because the complaint also alleges that Muller was disciplined because she placed union literature in the nurses lockers, and that is not what Corbett disciplined Muller about, I dismiss the allegation pertaining to the discipline. The General Counsel did not litigate that Respondent violated the Act when it gave Muller a warning for illegal solicitation.

The General Counsel also contends that the conversation constituted illegal interrogation. The Board instructed in *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), that an interrogation is illegal when, under all the circumstances, the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act. Evidence of the coercive nature of Corbett's interrogation is mixed. Corbett was Muller's immediate supervisor, and the meeting was held in Corbett's office. However, Muller was an open and active union supporter. Corbett knew that Muller had previously gone to a union meeting and knew that Muller actively supported the Union. Indeed, Corbett gave Muller the warning about soliciting union support from another nurse. (Muller's picture appeared on the first page of a union flyer, but the record does not make clear whether the flyer was distributed before the conversation. Corbett did not testify that she saw that flyer.) The nature of the conversation does not appear to be threatening and the questions were not ''designed to determine [Muller's] involvement in protected activities.'' *Hunter Douglas, Inc*., 277 NLRB 1179, 1181 (1985), enfd. 804 F.2d 808 (3d Cir. 1986). Nor did the interrogation seek to find out about

the support of the Union by other nurses. Rather, the conversation appeared to be harmless and ended with Corbett and Muller hugging, hardly the reaction of an employee who has been coerced. I conclude that it did not violate Section 8(a)(1) of the Act. *UARCO, Inc*., 286 NLRB 55 (1987); *Churchill's Supermarkets*, 285 NLRB 138 (1987); *Keystone Lamp Mfg. Corp*., 284 NLRB 626 (1987); *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985).[9]

Respondent had a rule since 1986, which permitted the wearing of ''[p]rofessional pins, Association service pins, or those authorized by Administration,'' but prohibited the wearing of other ''pins, badges, insignia, buttons, signs, etc.'' This rule, like the bulletin board rule, was honored in its breach. Registered nurses wore Redskins buttons and buttons celebrating holidays, such as Valentine's Day, Christmas, Thanksgiving, Halloween, St. Patrick's Day, and Easter (for example, shamrocks, bunnies, skeletons which lit up). They wore buttons related to health care, such as those noting that they had given blood or ''Nurses are the Heart of Health Care'' or ''Just Say No.'' Others were humorous, such as ''Just Turned Forty,'' ''I Need a Vacation,'' and ''No Panic.'' Others were ''cute,'' such as bears and Garfield the Cat. There were yet other buttons that had been distributed by the Hospital and related to services provided by it or health messages that it wished to impart. Finally, nurses wore buttons that had been distributed by their nursing associations. (The General Counsel contends that that these were ''Association'' pins, which were permitted by the rule. However, as used in other of Respondent's rules, ''Association'' refers to the ''Fairfax Hospital Association,'' whatever that entity is, but undoubtedly the same as the employer of the nurses in this proceeding.)

The Union decided to hold a ''Button Day'' and at noon on April 17, 1989, union supporters put on buttons which read:

NURSES:
LET'S WORK
TOGETHER
FPNA/DCNA

The pin showed clasped hands, undoubtedly preaching ''solidarity.'' The same day Respondent promulgated the following new rule:

> All Association employees must wear an authorized name tag while on duty. Only professional pins, service pins may be worn in immediate patient care dress [sic].

Beginning that afternoon, nurses were told that they could not wear their FPNA/DCNA buttons. The Hospital maintained its position, despite the nurses argument that the Union was a professional association and that the official policy of the Hospital permitted the wearing of professional and association buttons. The nurses were advised that the policy was going to be strictly enforced and that any violation would be met with disciplinary action. In fact, the policy was enforced, at least with respect to the FPNA/DCNA buttons; and some nurses (Catherine Meister, Joan Whalen, Elaine Muller, and Jan Hylton) were given formal warnings for wearing the buttons, the first step in Respondent's positive disciplinary process. Other nurses—Carol Awad, Lynn Baker, Janet Courtemanche, Brenda Craft, and Tina Price—were told that they were to remove their buttons; and Mary Jane Mastorovich, the Hospital's assistant administrator, testified that a request to remove a button was a form of discipline.[10]

As to other buttons, the Hospital's actions were mixed. Some nurses were immediately advised that they were no longer entitled to wear buttons that they had been wearing, without objection and without disciplinary action, before April 17. But the prohibition on all buttons and nonconforming accessories, other than the FPNA/DCNA buttons, did not last very long. Nurses returned to wearing blood donor buttons, Redskins buttons, teddy bears, holiday buttons, humorous buttons, and the like. They continued to wear buttons provided by their own nursing associations. For example, the nurses in the orthopedic unit wore T-shirts and buttons which read: ''I Love Every Bone In Your Body.'' The postanasthesia nurses wore buttons stating: ''Wake Up With a Recovery Room Nurse.'' In May 1990, when the hearing in this proceeding began, many nursing coordinators again started to enforce the rule, but not in all units.

The Board's normal rule is that employees have a protected right to wear union insignia while at work. *Ohio Masonic Home*, 205 NLRB 357 (1973), enfd. 511 F.2d 527 (5th Cir. 1975). The leading decision of *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978), will be dealt with in more detail, below; but suffice it to state at this point that a rule that prohibits union solicitation in immediate patient-care areas in a health care facility is presumptively valid. Based on that decision, the Board has applied a similar presumption to the wearing of union insignia. *Mesa Vista Hospital*, 280 NLRB 298 (1986). The Board, however, will consider whether the health care facility promulgated the rule to promote the health and welfare of its patients or to thwart the employees' right to organize. *Ohio Masonic Home*.

Here, there is no question that Respondent promulgated the rule in a direct and speedy reaction to the Union's ''Button Day.''[11] Before April 17, Respondent never appeared to care what buttons were being worn. The nurses wore whatever they wished, and Respondent prepared its own buttons which it asked the nurses to wear. The prohibition of April 17 was thus directed at no legitimate interest to protect patients from the buttons. Rather, the prohibition was part of Respondent's plan to stop all communication about the Union, even if the communication consisted of only a few words, as innocuous as those words that Respondent permitted to be worn on another button: ''Nurses are the Heart of Health Care.'' *Baptist Memorial Hospital*, 225 NLRB 525 fn. 3 (1976). The rule was also amended to exclude the wearing of ''Association service pins,'' undoubtedly because

[9] The General Counsel's motion to strike a section of Respondent's brief as not being supported by record evidence is denied. In so ruling, I have considered that section, find it unpersuasive, and have not relied on it.

[10] Claire Cocklin testified that she may have merely attended a meeting at which Respondent's new policy was announced. I do not find that this proves that she was disciplined.

[11] So speedy was its action that Respondent issued its new rule with the typographical error noted in the above quotation. However, to conceal that its action resulted from the Union's button, the rule was dated back to April 3, although Greene's memorandum announcing it was dated April 17.

Respondent realized that the nurses were arguing that the Union was an ''Association'' and the old rule might authorize the wearing of the Union's pin. The new rule, without the language about ''Association'' pins, was quickly applied to the Union's button, and it has always applied to that button, while the nurses have once again reverted to wearing their buttons which relate to a wide variety of other matters.[12]

Respondent's brief contends that its rule was amended because the earlier rule ''contained a provision which prohibited, without limitation, the wearing of non-professional buttons or pins;'' and that rule was ''overly broad'' and ''in violation of Board law.'' As amended, the rule permitted employees to wear union pins ''in all areas of the Hospital, except for immediate patient-care areas.'' As neat as this argument might appear, no one testified that this was the reason for the amendment; and I find that it constitutes merely a convenient pretext to excuse the illegality. In addition, even though a number of Respondent's supervisors testified that they enforced the new rule, I find that they did not and that nurses continued to wear buttons which did not offend their supervisors; but the nurses were afraid to wear their union buttons. Respondent also contended that its policy was changed to prevent any disruption in patient-care areas. Because Respondent freely handed out its much more inflammatory antiunion tracts in patient-care areas, which it knew would cause the nurses to react, I find that it was unconcerned about the creation of disruption. Respondent also alleges that it repudiated its prior unlawful conduct and thus relieved itself from liability. *Passavant Memorial Hospital*, 237 NLRB 138, 138–139 (1978), requires, among other things, that any ''repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights.'' Respondent gave no such assurances. Indeed, a review of the record reveals that it repudiated nothing. I reject that defense.

I conclude that the promulgation of the April 17 rule was illegal from its inception as it was motivated solely by the Union's pin and has, in any event, been disparately applied only to buttons issued by the Union. Respondent's requests of its nurses to remove their union buttons and its discipline of them violated Section 8(a)(1) of the Act.

Another manner which the complaint alleges that Respondent tried to cut off communication among the employees was by enacting the following no-access rule:

STATEMENT

Off-duty employees are not allowed to return to, or to enter, the Hospital's physical property or premises unless to visit a patient, receive medical treatment or to conduct hospital-related business.

GUIDELINES

A. An off-duty employee is defined as an employee who has completed his/her normally scheduled shift.

B. Hospital-related business is defined as the pursuit of the employee's normal duties or duties as specifically directed by management.

C. Special exceptions to this policy will require the prior approval of the appropriate assistant/associate administrator and the director of personnel.

The amended complaint alleges that this rule, adopted ''[i]n or around mid-October 1988,'' was ''overly broad.'' This allegation was omitted from the original complaint, which was based on the Union's unfair labor practice charge filed on April 17, 1989; and Respondent now contends that the charge was filed outside the time allowed by the Act's 10(b) 6-month limitations period. The complaint also alleges that the rule was applied disparately and selectively on April 20 to coerce three off-duty nurses to leave a parking lot and that, the following day, they were given disciplinary warnings for violating the rule.

Board law holds that a no-access rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas, (2) is clearly disseminated to all employees, and (3) applies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. *Tri-County Medical Center*, 222 NLRB 1089 (1976). Furthermore, an employer may not deny off-duty employees entry to outside nonwork areas of its premises, unless the employer provides an adequate business justification for doing so. Ibid.; *Orange Memorial Hospital*, 285 NLRB 1099, 1100 (1987); *Presbyterian Medical Center*, 227 NLRB 904, 905 (1977), enfd. 586 F.2d 165 (10th Cir. 1978).

Respondent's method of disseminating its no-access rule was anything but clear. Employees were typically advised of the existence of a new policy by the issuance of a memorandum. For example, when Respondent issued its mailbox rule and revised personal appearance policy, it advised the employees in separate memoranda. Here, it did not. Usually, new policies were also placed in communications and policy books which were maintained in the various units and were announced by the nursing coordinators at staff meetings. Here, Respondent contended that it placed its new no-access rule in the books, but the rule was never announced at staff meetings. Most nurses were unaware of the existence of the rule, but there were exceptions. Hylton found out about the rule in mid-October 1988 when she returned to work while off duty to distribute some literature about collective bargaining. She was told by then Director of Surgical Nursing Karen Lemieux to go to the staffing office to read the policy. That office was not the location where the Hospital posted its policies at that time, but Hylton found it posted. The rule had not been in the unit communications and policy book, but was there the next day. Other nurses testified that they first found out about the rule when they saw it posted (in November 1988), or when they saw it lying on a table and later saw it posted (summer 1989) or when they heard about it from one of the nurses who had been disciplined in April 1989, and only one of the three disciplined nurses knew of the rule before then.

[12] The Union's motion to reopen the record to receive a videotape of a nonunit employee wearing various paraphernalia illustrating an obsessive love of the Washington Redskins is denied. The incident happened long after the hearing in this proceeding closed, and the granting of the motion would entail the reopening of the hearing to enable Respondent to explain its position and present additional evidence, all of which would add nothing, because the record amply demonstrates that the rule against the wearing of pins was disparately applied.

Respondent's brief contends that this testimony was insufficient to refute the testimony of Greene, who stated that employees are informed of the Hospital's personnel policies either through the internal mailboxes or from their supervisors or managers. Greene did not aver that the no-access rule was made known to the employees in either of these ways; and, although optimally, this is what Greene had hoped would happen with all the policies and rules, his generalized answer was insufficient to rebut successfully the testimony of the General Counsel's witnesses. Not one nursing coordinator testified that she told her nurses about the rule and no copy of any memorandum was placed in evidence. The testimony of Scott Southee, parking ID coordinator, that the Hospital's parking policy is ''located in every administrative binder, which is located on every nursing unit, in every department'' adds nothing to meet Respondent's burden to show the dissemination of the no-access rule to the nurses because Respondent failed to disseminate the rule through the channels it normally utilized. I thus find it unlikely that Southee did anything. Even if he did, the nurses were not expected to find new rules which Respondent was less than open in revealing. I find that the General Counsel produced enough to meet his burden that the rule was not clearly disseminated to all employees, as Board law required, and I reject Respondent's defense that the complaint's allegation was barred by Section 10(b). Except for Hylton, who discovered it only because she was being disciplined, no one was aware of the existence of the rule until November 1988, well within the 6-months' time for filing.

Furthermore, I find that Respondent had no legitimate reason for the adoption of its rule. Respondent offered two reasons for its promulgation. First, parking at the Hospital had reached the critical stage. There were not enough parking spaces available for all the employees on the afternoon shift if the day shift employees did not leave promptly. There are a number of problems with Respondent's position, not the least of which is that there was an utter failure of proof with respect to the other shifts, which traditionally employ far fewer staff. Thus, there was no showing that there was a parking problem if employees were to arrive early in the morning, when they were replacing the lesser number of employees on the night shift, or were to arrive after the day shift had ended, at which time the parking lot should have emptied. Indeed, Respondent's brief contends that it was ''important to minimize any activity which would interfere with the availability of parking areas during the critical 2:30 p.m. to 3:30 p.m. time period.'' The rule was not limited to solving that problem, but was an illegal, blanket prohibition, not on parking, but on employees' access to Respondent's property for all the time that they were not working. *Presbyterian Medical Center*, 227 NLRB 904, 905 (1977), enfd. 586 F.2d 165 (10th Cir. 1978). In addition, public buses stopped outside the Hospital's premises. If employees came by bus, they would not cause any problems in the parking areas; nor would any problems be caused by employees who parked on the public streets.

The second principal reason that Respondent relied on was that the parking lots were riddled with crime—assault, vandalism, theft, and suspicious persons. Respondent introduced evidence showing that there were numerous reports of illegal activity, but this activity occurred primarily in 1986 and 1987, and the number of incidences had tapered off in 1988, when (late in the year) Respondent adopted its new rule. This is not to disparage the Hospital's attempt to lessen the amount of crime, but the timing of the adoption of the no-access rule, enforced for the first time only after the union campaign began, is rather persuasive evidence that the Union, not crime, was behind this rule. Besides, Respondent's proof of the conduct that it was allegedly attempting to prevent was less impressive than its brief portrays. For example, its allegations of ''several violent assaults'' was actually supported by one, another being a report of a wandering, suspicious woman (October 1987); and its allegations of four incidents of ''extensive damage to vehicles'' was supported by three where there was no damage and one of a broken cable, where it was difficult to determine whether the cable (under the car) was an act of vandalism. Almost all of these incidents occurred in 1987, a year before Respondent adopted its rule. Furthermore, the Hospital showed no correlation between the commission of crime and the overuse of the parking lots; and none of the illegal conduct was engaged in by returning employees or employees who stayed after their working hours. The conduct was engaged in by others, and whether the nurses returned to the Hospital or not would have had no bearing on the commission of any crime. I conclude that Respondent had no adequate business justification for adopting its rule and that it violated Section 8(a)(1) of the Act.

It follows that the imposition of the illegal rule on the three nurses on April 20 and their discipline the next day equally violate the Act. The facts are simple. April 20 was 3 days after Respondent stopped the nurses from wearing their FPNA/DCNA buttons. Nurses Eisenhauer, Muller, and Dorothy Vasilchek distributed leaflets captioned, ''What's So Scary About A Button?'' Muller was on a public sidewalk:[13] yet, two of Respondent's security guards asked her what she was doing and took her name. Eisenhauer and Vasilchek were leafletting in parking lots of the Hospital, and Mastorovich told them that they were not allowed to pass out leaflets and asked them whether they knew that. Eisenhauer said that she did not and that, according to the no-solicitation rule, they were in the correct place. (That rule permitted solicitation in the parking lots by employees not on their working time.) Mastorovich asked her whether she had worked that day, and Eisenhauer replied that she had not. Mastorovich said that she was in violation of the no-access rule and again asked her to leave. Both nurses refused, but they stayed only 10 more minutes because most of the nurses had already left. The following day, the three nurses were given written warnings, each of which stated that it constituted the second phase of the disciplinary process and that additional violations could lead to further disciplinary action. Neither Eisenhauer nor Vasilchek had ever been disciplined before.

Because the underlying rule violated the Act, any discipline that was based on the illegal rule also violated the Act. Furthermore, the discipline represented ''double kill'' in the sense that Respondent was punishing two of the nurses for second violations, despite the fact that they had not been disciplined before, and Muller was not even standing on the Hospital's property. If that were not offensive enough, Hos-

[13] Respondent contends that Muller was standing with the other nurses. I credit Muller's testimony that she was not.

pital officials treated these nurses differently from the way that they treated nurses who returned to the Hospital not to engage in union activity but to attend going away parties, Secretaries' Day luncheons, baby and bridal showers, Christmas parties, and to go to the library, the credit union, or the gift shop, or pick up their pay checks, or eat in the cafeteria, or chat with or deliver tickets to other nurses, or to engage in sports.[14] Respondent contends that these nurses were engaged in Hospital-related business, but I find that the nurses were engaged in activities to benefit themselves. In addition, the Hospital has permitted demontrators to engage in antiabortion protests on the Hospital's property, sometimes involving as many as 800–1000 persons. (Greene noted, however, that if an employee wished to engage in the protest, the Hospital's no-access rule required that permission be sought and given to return to the Hospital. The 800–1000 demonstrators were not employees and did not have to obtain the same permission.)

In sum, the Hospital was interested in nothing but union activity, and the no-access rule was yet another attempt to ensure that employees would not be able to exchange their views about the benefits of union representation. If security and overparking were not a concern when there were 800-1000 protesters on the grounds of the Hospital, surely they could not have been legitimate concerns when three nurses were attempting to hand out their leaflets. The Hospital felt that it had to give a public forum to the antiabortion protesters. It did not have the same anxiety when it came to its dealing with the Union. That was an anathema; and, out of all the conduct that could be permitted, an attempt to organize by their employees could not be countenanced. That is blatant discrimination. I conclude that the discipline meted to Eisenhauer, Muller, and Vasilchek violated Section 8(a)(3) and (1) of the Act.

Respondent's obsession with the union movement was not limited to making rules to discourage it. On May 5, from 5:30 a.m. to 7 p.m., nurses and other supporters of the Union, about 30 in all, some carrying balloons and none wearing signs, distributed packets of union materials around the perimeter of the Hospital. Respondent had advance notice that there was going to be some union activity, and at 2 o'clock that morning had picked up some union literature which stated that nurses would be standing on county sidewalks and roads adjacent to the entrances to the Hospital and were going to be handing out authorization cards and other literature.

Prior to May 5 Greene had arranged to have photographers available to take still photographs and videotapes of the participants. Greene, Tim Klagholz, Respondent's director of its media services department, and the photographers drove around the premises of the Hospital for an hour, taking pictures, many with telephoto lenses, often on the direction of Greene, who pointed out the leafleteers he wanted pictures of. Klagholz and a photographer went out in another car later in the day to do the same picture-taking. In addition, Greene stationed a videocamera at the front entrance of the Tower Building, the Hospital's central structure, and demonstrators were taped from this location, too. As if that were not enough, the Hospital's security guards were also instructed to watch the leafletting all day; and Nursing Directors Kathleen Garrity and Lemieux also rode in other vehicles, Lemieux admitting that her function was to observe the union activity.

Although it is true that an employer's mere observation of union activities that are conducted in public does not violate Section 8(a)(1) of the Act, *Porta Systems Corp*., 238 NLRB 192 (1978), and that management need not hide, *Tarrant Mfg. Co*., 196 NLRB 794, 799 (1972), Board law does not authorize an employer to use patrolling cars, cameras, and videotapes to enhance its identification of those who are lawfully engaging in protected Section 7 conduct. The law permits the Hospital not to close its eyes, but it does not permit it to enhance its vision with telephoto lenses and to make repeated runs in cars around and around the premises. That constitutes activity out of the ordinary and has the tendency to unreasonably chill the exercise of employees' Section 7 rights. See *Hoschton Garment Co*., 279 NLRB 565, 567 (1986).

Respondent makes much of its alleged concerns, but those concerns were at best fabricated, because there was not one bit of conduct engaged in by the demonstrators that involved any trespass, any violence, or any improper conduct. Nor was there any stoppage of work, or any threat which could reasonably have been interpreted as a stoppage of work, which would have permitted Respondent to rely on the fact that the Union gave it no notice under Section 8(g) of the Act, the purpose of which is ''to give health care institutions an opportunity to prevent the disruption of patient care which can be foreseen by . . . picketing.'' *Service Employees Local 84 (Baptist Memorial Hospital)*, 266 NLRB 335, 336 (1983). First, there was no picketing, and there was no strike. Indeed, at 2 a.m. Greene had notice of the harmless activities that were going to be conducted later that morning. Even if Respondent had shown a reasonable idea that something dire was going to happen, and it is questionable that this would have necessarily permitted Respondent to take its pictures, *Glomac Plastics*, 234 NLRB 1309, 1320–1321 (1978), there is nothing to justify its repeated surveillance, with instructions to zero in on the faces of particular employees and others, even after it should have been evident that nothing more was going to occur than had already occurred.

Respondent's reliance on the fact that it also videotaped the antiabortion rally is misplaced. First, the demonstrators were not protected under the Act. Second, even the videotape did not evidence the closeup photography that was engaged in to identify the persons involved in the union activities. Finally, the fact that pictures were also taken by the media and even by a friend of one of the participants who invited him to take the pictures, makes no difference. The essence of the unfair labor practice charge is that employers have no right to spy on the union and concerted activities of its employees. Such spying is coercive. The spying causes employees to fear that their employer has specifically identified them to take action, such as discharge or other discipline. Thus, it constitutes a threat to the employees. Even if the union adherents had made their identities public, here the Hospital's

[14] It is true, as the Hospital contends, that there was proof that Hospital officials saw only some of these nurses returning, but I find that there was hardly any effort to search them out. I find especially persuasive the testimony of those nurses who returned to attend parties at which their supervisors were present. No effort was made to direct those nurses off the Respondent's property. Only union activists were really being looked for, as evidenced by various reports of the security guards who searched the lots for automobiles containing union paraphernalia.

supervisors and agents made repeated trips around the premises, videotaping at length and taking numerous photographs. That would have the tendency to discourage the employees from acting as they were doing, because they were being targeted in such a fashion, and violates the Act.[15] See generally *Cannon Electric Co.*, 151 NLRB 1465, 1468–1469 (1975).

The final rule attacked in the complaint relates to the employees' right to solicit support of the Union and distribute materials about it. The rule reads:

STATEMENT

Solicitation for any purpose among employees has the effect of disturbing and disrupting the provision of health care services. Therefore, Fairfax Hospital Association prohibits solicitation for any purpose in designated patient care areas.

GUIDELINES

A. *Persons Not Employees of the Association*: Persons who are not employees of Fairfax Hospital Association may not solicit for any purpose on the premises of the Association.

B. *Association Employees*: Individuals who are employees of the Association may not solicit any employees, nor distribute literature, for any purpose during their working time. Working time means the period of time scheduled for the performance of job duties, not including mealtimes, breaktimes or other periods when employees are properly not engaged in performing their work tasks.

C. *Areas Within Association Facilities Where Solicitation is Specifically Prohibited*:

—patient rooms;

—operating and recovery rooms;

—nurse's stations;

—rooms where patients receive treatment, such as treatment rooms of the emergency department, radiology, radiation oncology, and other therapy rooms;

—corridors adjacent to patient rooms, operating and recovery rooms, treatment rooms;

—sitting rooms on patient floors accessible to and used by patients;

—elevators or stairways used frequently to transport patients;

—locker areas adjacent to patient care areas.

D. *Areas Where Solicitation Is Not Restricted*: Areas where solicitation by employees not on their working time is permitted includes cafeterias, lobbies, gift shops, lounges, locker rooms, rest rooms and parking lots.

E. *Areas Within Association Facilities Where Distribution is Specifically Prohibited*: Distribution of literature in any work areas (to include areas listed in par C) is prohibited.

F. *Disciplinary Action*: Solicitation for any purpose during working time and/or in any of the areas where solicitation is prohibited will subject the employees to disciplinary action. Distribution of literature any time in working areas will subject the employee to disciplinary action.

The Act protects generally employees' right to self-organization. In order to organize effectively, employees must be permitted to talk with other employees to solicit their views and attempt to convince them of the benefits of mutual association. While employees are, during their working hours, expected to devote their full attention to their work—after all, that is what their employer is paying them for—during their nonworking time, they are not being paid and generally have the right to do what they want. Thus, the Board usually presumed that no employer could adopt a rule prohibiting solicitation on nonwork time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803–804 fn. 10 (1945). However, the Board found this presumption unworkable in a hospital setting because it gave too little weight to the need to avoid disruption of patient care and disturbance of patients. Thus, the Board found that it would not regard as presumptively invalid proscriptions against solicitation in immediate patient-care areas, *St. John's Hospital*, 222 NLRB 1150 (1976), enfd. in part 557 F.2d 1368 (10th Cir. 1977), a position accepted by the United States Supreme Court in *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). There, the Supreme Court upheld the Board's conclusion that the hospital had not justified its prohibition of union solicitation in the cafeteria, gift shop, and lobbies on the first floor of the hospital.

Respondent's no-solicitation rule is carefully crafted to bring it within the scope of *Beth Israel*, but the General Counsel contends that the rule was invalidly applied because Respondent permitted employees to solicit other employees and distribute material to them in violation of the rule, while it disparately enforced the rule when prounion employees attempted to solicit support for the Union or attempted to distribute material about it. Furthermore, the General Counsel contends that Respondent itself solicited employees with antiunion material in areas prohibited to union adherents.

The rule did not restrict solicitation in Respondent's cafeteria, but the adjoining meeting room, the cafetorium, was not one of the areas where the rule permitted solicitation. However, book sales from the Hospital's library and outside booksellers, a fall craft fair, and shoe sales have been held there. Blood drives have been held in the cafeteria, and books and tickets have been sold there, as well as the advertising of picnics and hospital trips. The following items, among others, have been sold, sometimes in open view of patients, in various areas where the Hospital has prohibited solicitation: Tupperware, Avon products, Girl Scout cookies, candy bars, citrus fruit, Easter baskets, flowers, plants, tote bags, T-shirts, Christmas cards, wrapping papers, and ribbons. I infer from the widespread and open solicitation and distribution of these items that Respondent had full knowledge of these solicitations. *St. Vincent's Hospital*, 265 NLRB 38 fn. 3 (1982), enfd. in relevant part 729 F.2d 730 (11th Cir. 1984).

The record is barren of any evidence that anyone has ever been disciplined for advertising or selling any of these products. Yet, union literature was subjected to different rules.

[15] Although of no importance to this conclusion, I specifically discredit Respondent's witnesses, all of whom testified that they made no notes of who was engaged in the Union's demonstration and that they reported what they saw to no one. I find wholly improbable that their car rides were mere purposeless pleasure tours of the Hospital's grounds. In addition, to the extent that Respondent attacks the credibility of the General Counsel's witnesses, who testified to the surveillance, I credit them.

Greene testified that distribution of union literature at the nurses station was a violation of the rule. Nurses were warned that they were prohibited from distributing union literature in the nurses lounge, despite the fact that a notice for a shower, after having been removed from a bulletin board, was allowed to remain on the table in the lounge, and the additional fact that the nurses lounge was supposedly exempt from the rule. (Indeed, Nursing Coordinator Jonathan Hurwitz told Price that she was not allowed to bring union literature into the Hospital at any time.) So, union material that was left there, and even in the cafeteria, was confiscated.

While the union adherents were restricted by the no-solicitation, no-distribution rule from freely handing out their propaganda, the Hospital felt itself bound by no such restrictions, even in areas where the Union was not allowed to campaign. Respondent published numerous antiunion posters (11 by 17 inches) which were placed on the bulletin boards and smaller versions of which were printed as handouts. Some of these were headed ''Why Fairfax Nurses Oppose The Union,'' and Respondent advised all the nursing coordinators to make sure that they were distributed to all the nurses. Often these were distributed while the nurses were working and in patient-care areas, most often at or near the nurses stations, and sometimes in areas in close proximity to patient rooms. They were also left in the nurses report rooms.

On December 4, 1989, Nursing Coordinator Director Marianne Heberer suspended for 1-day of ''decision-making leave'' nurses Vasilchek and Vicki Herman for violating the rule. That meant that they were to go home and think things over to see whether they understood what they had done wrong and to return to work only if they intended not to err again. This resulted from the following credited facts, which primarily are those related by nurse Tracy Maslyn, who I found had no reason to misstate what happened, whereas Vasilchek and Herman slanted their narration to protect themselves from the Hospital's discipline: Earlier, during the night shift of November 13–14, Maslyn was reassigned to the unit on which Vasilchek and Herman regularly worked. Vasilchek and Herman went into the cubbyhole, a small open area off the nurses lounge and an area where nurses would regularly take their break on the night shift, despite the fact that it was also used by the nurses for charting and documentation work, paging people, and making phone calls.

Maslyn was there, charting. Vasilchek and Herman, recognizing that Maslyn was pregnant, started a conversation about her future plans, whether she was going to return to work after she had had her baby, and the quality of the Hospital's health and child care benefits. They mentioned that the Union was very active in pushing the Hospital to build a day care center. They asked whether she knew about the Union, whether there were active union supporters on her floor, and whether she would be interested in attending a union meeting, which would be code-named a Tupperware party (presumably so that management would be unaware of what was going on.) They asked whether she would be interested in reading about the Union; and when Maslyn said that she would, Herman left to get a union authorization card and a union flyer. Herman returned and gave her the documents. Vasilchek also gave her a union newsletter. The conversation ended, and all returned to work. However, Vasilchek noticed that Maslyn had left the union literature where she had been sitting. Vasilchek brought the literature to her—she was standing near the nurses station—and told her to take the information and read it later. Heberer eventually found out about the conversation and the distribution of the union material, and the discipline followed.

The General Counsel is incorrect in claiming that Respondent disparately enforced its no-solicitation rule because it solicited its antiunion material in violation of its own rule. In *Summitville Tiles*, 300 NLRB 64 (1990), the Board stated that Section 8(c) permits an employer and its agents to express their views on unionization as long as the opinions do not contain proscribed threats or promises, citing *Gissel Packing Co.*, 395 U.S. 575, 618–619 (1969). Absent evidence that a union does not have sufficient means to communicate with the employees, an employer does not violate the Act by enforcing a valid no-solicitation rule while engaging in antiunion solicitation of its own. *NLRB v. Steelworkers (Nutone, Inc.)*, 357 U.S. 357, 364 (1958). As the Board stated in *St. Francis Hospital*, 263 NLRB 834, 835 (1982), enfd. 729 F.2d 844 (D.C. Cir. 1984): ''[N]othing in law nor logic limits this right of an employer to discussions with employees only in nonwork areas on the employees' breaktimes.'' To the contrary, an employer may lawfully campaign during employees' nonbreaktime and in working areas even though employees may not do so. In such a case, an employer has not unlawfully enforced its no-solicitation, no-distribution rule in a disparate manner or unlawfully violated its rule.

That does not mean, however, that Respondent is free to limit its employees' rights without limitation. The Board's general rule is to permit employees to organize during their own time. Only in hospitals is there a limitation on the places where the employees may exercise their rights, and that is because the Board presumes that organizing in patient-care areas will be disruptive to the medical care that is the hospital's primary mission to deliver. Here, Respondent, by engaging in the very activities prohibited to its employees, has created evidence that perhaps its limitation on its employees is not warranted, that employees' solicitation in the same areas would not disrupt the delivery of medical care. In other words, although Respondent has the right to solicit and distribute as it wishes, it may not limit its nonworking employees from engaging in Section 7 activities when they are not working and when they are in areas where there would be no disruptive effect.

Here, Vasilchek and Herman testified that they were on break, although Maslyn disputed the fact that they were eating their sandwiches, as they contended, and I have credited her. But, even assuming that they were on break, Maslyn was not; and the rule prohibits solicitation which ''has the effect of disturbing and disrupting the provision of health care services.'' She was charting, and Vasilchek and Herman were disturbing her work and causing her to delay finishing her work within her normal shift. Respondent's rule was intended to prohibit solicitations during working time, and the rule is drawn so broadly that it prohibits both off-duty and on-duty nurses from soliciting nurses who are working.[16]

[16] The rule states that ''employees . . . may not solicit any employees, nor distribute literature, for any purpose during their working time.'' It is unclear whether the word ''their'' refers to the employees who are soliciting or being solicited. In light of the general purpose of the rule, it may reasonably be argued that it refers to both.

The General Counsel contends that Respondent did the very same thing as Vasilchek and Herman did. Indeed, several months later, on March 1, 1990, Heberer gave Vasilchek one of the Hospital's antiunion flyers in the same cubbyhole, while Vasilchek was charting. And there is sufficient evidence that many of Respondent's antiunion tracts were handed out at the nurses station and in other areas which Respondent protests were patient-care areas.[17] Furthermore, Greene testified that Respondent knew that its literature would generate discussion, as it in fact did.

However, there is nothing in the record to prove that Respondent permitted its employees to engage in antiunion discussions or solicitations in patient-care areas or when they were on duty. To the contrary, on one occasion, a nursing coordinator asked some nurses to leave the nurses station and go back into the cubbyhole so that the patients would not overhear them. Furthermore, as noted above, Respondent had the right to solicit employees and to distribute literature, whereas employees had no such right. Finally, the General Counsel complains that the punishment must have been illegally motivated because Respondent disciplined the two nurses for two violations, solicitation and distribution. However, under section F of the rule, violation of the no-solicitation and no-distribution rules are treated as separate violations; and I find no evidence that Respondent incorrectly or disparately charged the nurses with two violations, rather than one, for their conduct. They solicited Maslyn to become interested in the Union and distributed material to her, both of which are violations. Accordingly, I will recommend that this allegation be dismissed.

However, having prohibited dissemination of and confiscated material in places where its rule permitted employees to engage in such activities, and having prohibited employees from engaging in those activities in locations which, by its own conduct, Respondent could not have considered patient-care areas, Respondent violated Section 8(a)(1) of the Act. Respondent's rule unduly restricted the nurses' ability in their free time to solicit and distribute for the Union in areas where Respondent permitted solicitations in violation of the rule, and Respondent maintained and enforced the rule only as it pertained to union solicitations and distributions. I conclude that Respondent's maintenance and disparate enforcement of the rule violates Section 8(a)(1) of the Act.

The final allegation of the complaint relates to the discharge of Richardson on March 8, 1990. Richardson was a nurse in the hemodialysis unit at the Hospital. She had 27 years of experience as a nurse, 15 at the Hospital, and was certified in her specialty. On March 5, 1990, she saw posted in her unit one of Respondent's series of ''Why Fairfax Nurses Oppose the Union,'' which told of a particularly ugly event of a patient being told on his way to surgery that he would not receive good treatment because his wife had refused to support the Union. Two days later, during a break, Richardson engaged in a heated discussion with her nursing coordinator, Terri Booth, about the substance of that poster, which Booth had given her a copy in its flyer version. Richardson doubted that the facts could be accurate, while Booth believed the flyer, and Richardson asked in bewilderment how Booth could believe that a nurse could engage in that sort of conduct. She said that she had never seen any conduct like that in all her years of nursing. Despite her arguments, Booth maintained that the Hospital would never falsely publish any such information.

Richardson tried other means to persuade Booth that the facts were illogical and could not be true. She thought that Booth ought to have known that the incident could not have happened and was offended that, if Booth thought carefully about the allegation, she would have known that it was false and would never have circulated the handout, that the poster was big enough that she could read it on the bulletin board. Richardson asked why, in addition to posting the poster on the normal bulletin board, it also had to be put in the nurses' bathroom. Booth replied that the Hospital owned the entire hospital and could post its propaganda wherever it wanted. Richardson contended that the prounion nurses should also be able to post their notices. (The record amply demonstrates that the prounion posters had been taken down in these locations.)

The break was ending and, as Richardson was getting up to leave, Booth commented that the Hospital's posting was unpleasant for everyone and the unpleasantness was probably going to get worse. Richardson recalled that Booth said: ''[Y]ou better get used to it because there will be a lot more of these things coming.'' Richardson replied that Booth could expect ''retaliation.''

Richardson's use of the word ''retaliation'' caused her discharge, at least according to Respondent, whose witnesses uniformly testified that they understood that to mean that Richardson threatened Booth with physical harm. Booth said that she was so alarmed that she became nauseous and poured herself three cups of coffee before she realized what she was doing. She could barely control herself. She reported the incident to her supervisors; and, as each inquired into the incident, each became alarmed at the emotional intensity of the situation, and each reached the conclusion that the threat of physical harm to a supervisor would not be tolerated.

I watched all the witnesses carefully as they testified. I have reviewed the official transcript numerous times. I do not believe Respondent's witnesses. I find that they were not sincere; I find that they were not candid. I find, instead, that they seized upon the word ''retaliation'' as a means of ridding themselves of one of the Union's outspoken supporters to show to all nurses the dangers of questioning management's antiunion positions.

There is absolutely nothing in Richardson's background, as a person, as a nurse, and as an employee, to indicate that violence is part of her makeup. Rather, she is a consummate professional, dedicated to the care of her patients. She is an advocate of the rights of patients. She is an educator. She is devoted to nursing. She is a woman of substance. She is principled. She is highly thought of by her peers. It is true that she is outspoken, and she may be more animated and more intense, and her voice may rise above normal conversational levels. But to make her appear as a common street bully is wholly unwarranted, and I find that Respondent's accusation was made with no sincerity.

Second, although the word ''retaliation'' might be stretched to subsume some understanding of violence, that

[17] ''Monday Rounds,'' which is published by Respondent and has been left in stacks at the front desk of the nurses stations, is not evidence of disparate application of Respondent's rule. Despite the fact that the publication contains some advertisements, it is primarily a newsletter of interest to the Hospital community and not a commercial document.

stretching is undoubtedly incorrect. ''Retaliation'' correctly means an action which is returned in kind. Webster's *Third New International Dictionary*, 1981, defines ''retaliation'' as ''an act of retaliating : REQUITAL; esp : return of evil for evil.'' ''Retaliate'' is defined as ''vt 1 : to return the like for : repay or requite in kind (as an injury) 2 : to put or inflict in return . . . vi : to return like for like : make requital; esp : to return evil for evil.'' The dictionary further notes:

> syn RECIPROCATE, RETALIATE, REQUITE, and RETURN can mean to give back usu. in kind or quantity. RECIPROCATE can imply a mutual, equivalent or roughly equivalent, exchange or a paying back of what one has received . . . RETALIATE usu. implies a paying back in exact kind, often vengefully . . . REQUITE can imply simply a paying back usu. reciprocally, but also often implies a paying back according to what one considers the merits of the case . . . .

The latter part of the Booth-Richardson conversation was devoted to the Hospital's right to post and distribute its antiunion tracts, while the Union was left helpless in its efforts to spread its message in the Hospital. The tenor of the discussion was devoted to what Richardson decried as an inflammatory, outrageous attack on the Union. All that was talked about was literature, and Richardson's use of ''retaliation'' was obviously intended to reflect her decision, on behalf of the Union and the nurses, to attack, in words, the flyer that she complained was not only unfair but also untrue. There were two nurses who heard either all or parts of this conversation. Neither characterized Richardson's comment as being one that could reasonably be understood in the entirety of the circumstances as one which threatened physical harm.

Even if there were some threat made by Richardson, Respondent's rules nonetheless presented it with a problem. Respondent had a system of progressive discipline, and a threat did not fit easily into its guidelines to permit it to discharge an employee. This is not to say that a serious threat (with a knife, for example) could under no circumstances be the basis for the immediate firing of an employee, but Respondent justified its discharge of Richardson by noting that its rules specifically permitted the discharge of one who assaulted another. Because Richardson threatened Booth with physical harm, her words were in the nature of an assault, according to Miller, who approved Richardson's discharge. Interestingly, Respondent's brief hedges on this, noting that there was ''future physical *or psychological* harassment of Ms. Booth'' and that Richardson intended to inflict on Booth the same type of injury that Richardson said that she had suffered: ''personal upset, offense and anger.'' (Emphasis added.) There is no question that there was no physical contact made at any time by Richardson, no less an assault with an intent to harm anyone. In addition, although Respondent's disciplinary rules seem to require it to talk with its employee and obtain that person's views of the incident, no one talked to Richardson. She was a dangerous person, in effect a common felon, in the Hospital's eyes. Conveniently, all connected with the Hospital disregarded her outstanding evaluations, her expertise, her humanity, in a desperate rush to prove that the defense of the Union might well subject an employee to harm much greater than having to read antiunion material.

What lingers is whether Booth was as hysterical as most of Respondent's witnesses said that she was. If she was, it was not because of any threat. I am convinced that Booth was upset; but she was mad at the substance of the entire conversation. She was being ridiculed as Respondent's stooge, one who would believe without thinking that everything that the Hospital said was correct. Her intelligence and her allegiances were being questioned. However, Respondent's focus was on Richardson's attack on its labor relations policies. Respondent then used the word ''retaliation'' to concoct a legitimate reason for discharging her, whereas all that was really involved was a deeply felt disagreement arising from the Hospital's opposition to the Union's attempt to organize the nurses.

Finally, Richardson was complaining, in the presence of another employee, Linda Ensign, about the inability of the Union to post its literature, while Respondent was dramatizing its claims against the Union by means of untruthful literature posted on bulletin boards and distributed to all nurses in handouts. Her complaint constituted concerted and protected activity, and she could not be disciplined unless her conduct was so egregious as to render her conduct unprotected. I find that her conduct was not egregious within the meaning of Board law. Her threat dealt solely with her attempt to obtain Respondent's consent to the posting of the Union's material at the Hospital. *Leasco Inc.*, 289 NLRB 549 fn. 1 (1988); *Consumers Power Co.*, 282 NLRB 130, 132 (1986). I conclude that Respondent's discharge of Richardson violated Section 8(a)(3) and (1) of the Act.[18]

The unfair labor practices found herein, occurring in connection with Respondent's business, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. Specifically, I shall order Respondent to offer immediate and full reinstatement to Kathryn (Kitty) Richardson to her former position or, if her position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or

[18] Respondent contends that there is no evidence of union animus, because all of its writings were protected by the free speech exception contained in Sec. 8(c) of the Act, relying on *Holo-Krome Co. v. NLRB*, 907 F.2d 1343 (2d Cir. 1990). The Board did not adopt that holding on remand. 302 NLRB 452 (1991). Instead, it continues to hold that conduct that may not be found violative of the Act may still be used to show animus. *Gencorp*, 294 NLRB 717 fn. 1 (1989); *General Battery Corp.*, 241 NLRB 1166, 1169 (1979). Here, a finding of a lack of animus would have to ignore Respondent's series of posters and leaflets entitled: ''Why Fairfax Nurses Oppose The Union.'' It would also have to ignore that the argument between Richardson and Booth was one of the articles of that series and, in essence, what lengths the Hospital would travel in its opposition to the Union. Even if that particular article were ignored, Respondent committed numerous unfair labor practices which may be considered evidence of its state of mind, including its illegal attempts to discourage nurses from communicating about the Union in the Hospital.

privileges previously enjoyed, and to make her whole for any loss of wages and other benefits she may have suffered by reason of Respondent's discrimination against her, in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also order Respondent to rescind its rules prohibiting distribution of literature in employee mailboxes, denying access of off-duty employees to its property, and prohibiting employees from wearing insignia on their uniforms in support of the Union or any other labor organization. I shall also order Respondent to rescind its disciplinary warnings, including fact-finding memos or oral reminders, issued to any of its employees, including Carol Awad, Lynn Baker, Janet Courtemanche, Brenda Craft, Jan Hylton, Catherine Meister, Elaine Muller, Tina Price, and Joan Whalen, in connection with their wearing buttons in support of the Union and issued to employees Dorothy Vasilchek, Elaine Muller, and Kathleen Eisenhauer in connection with their leafletting activities on behalf of the Union; and remove from their files and the file of Richardson any reference to their unlawful warnings and discharge, respectively, and notify them in writing that this has been done and that the warnings and discharge, respectively, will not be used against them in any way.

On these findings of fact and conclusions of law and on the entire record,[19] including my observation of the demeanor of the witnesses as they testified, and my consideration of the briefs filed by the General Counsel, Respondent, and the Union, I issue the following recommended[20]

ORDER

The Respondent, Fairfax Hospital, a division of Inova Health Systems and Fairfax Health System, Inc., Fairfax, Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Selectively and disparately maintaining and enforcing its rule concerning employee bulletin boards by removing union-related solicitations and distributions while permitting nonunion-related solicitations and distributions to remain, in order to discourage its employees from supporting the District of Columbia Nurses Association, American Nurses Association (Union), or any other labor organization.

(b) Confiscating union literature from employee mailboxes.

(c) Promulgating and selectively and disparately enforcing any rule concerning employee mailboxes by prohibiting distribution of union-related materials while permitting distribution of nonunion-related materials, in order to discourage its employees from supporting the Union or any other labor organization and engaging in concerted activities for their mutual aid or protection.

(d) Promulgating and selectively and disparately enforcing any rule regarding wearing of union pins in patient-care areas by telling its employees to remove union buttons, while permitting others of its employees to wear nonunion-related buttons, in order to discourage its employees from supporting the Union or any other labor organization.

(e) Promulgating and selectively and disparately enforcing any rule prohibiting its off-duty employees from returning to its property by telling some of its employees to leave the grounds and disciplining them for violating the rule, while permitting others of its employees to return to its property, in order to discourage its employees from supporting the Union or any other labor organization and engaging in concerted activities for their mutual aid or protection.

(f) Engaging in surveillance of its employees' union activities.

(g) Selectively and disparately enforcing any rule concerning solicitation and distribution by prohibiting union-related solicitations and distributions while permitting nonunion-related solicitations and distributions, in order to discourage its employees from supporting the Union or any other labor organization and engaging in concerted activities for their mutual aid or protection.

(h) Discharging its employees because they join, support, or assist the Union or any other labor organization or because they engage in other protected concerted activities.

(i) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its rule prohibiting distribution of literature in employee mailboxes.

(b) Rescind its rule concerning access of its off-duty employees to its property.

(c) Rescind its disciplinary warnings, including fact-finding memos or oral reminders, issued to employees Carol Awad, Lynn Baker, Janet Courtemanche, Brenda Craft, Jan Hylton, Catherine Meister, Elaine Muller, Tina Price, and Joan Whalen, because they wore buttons in support of the Union.

(d) Rescind its April 17, 1989 revised personal appearance policy to the extent that it prohibits its employees from wearing insignia on their uniforms in support of the Union or any other labor organization.

(e) Rescind the disciplinary warnings issued to employees Dorothy Vasilchek, Elaine Muller, and Kathleen Eisenhauer because they leafletted on behalf of the Union.

(f) Offer Kathryn (Kitty) Richardson immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of its discrimination against her, in the manner set forth in the remedy section of this decision.

(g) Remove from their files any reference to the unlawful warnings issued to Elaine Muller, Carol Awad, Lynn Baker, Janet Courtemanche, Brenda Craft, Jan Hylton, Catherine Meister, Tina Price, Joan Whalen, Dorothy Vasilchek, and Kathleen Eisenhauer, and the discharge of Kathryn (Kitty) Richardson and notify them in writing that this has been done and that the warnings and discharge, respectively, will not be used against them in any way.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records,

[19] The parties' joint motion to amend the official transcript is hereby granted and the transcript is amended accordingly.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Post at its facility in Fairfax, Virginia, copies of the attached notice marked ''Appendix.''[21] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT selectively and disparately maintain and enforce our rule concerning employee bulletin boards by removing union-related solicitations and distributions while permitting nonunion-related solicitations and distributions to remain, in order to discourage our employees from supporting the District of Columbia Nurses Association, American Nurses Association (Union), or any other labor organization.

WE WILL NOT confiscate union literature from employee mailboxes.

WE WILL NOT promulgate and selectively and disparately enforce any rule concerning employee mailboxes by prohibiting distribution of union-related materials while permitting distribution of nonunion-related materials, in order to discourage our employees from supporting the Union or any other labor organization and engaging in concerted activities for their mutual aid or protection.

WE WILL NOT promulgate and selectively and disparately enforce any rule regarding wearing of union pins in patient-care areas by telling our employees to remove union buttons, while permitting others of our employees to wear nonunion-related buttons, in order to discourage our employees from supporting the Union or any other labor organization.

WE WILL NOT promulgate and selectively and disparately enforce any rule prohibiting our off-duty employees from returning to our property by telling some of our employees to leave the grounds and disciplining them for violating the rule, while permitting others of our employees to return to our property, in order to discourage our employees from supporting the Union or any other labor organization and engaging in concerted activities for their mutual aid or protection.

WE WILL NOT engage in surveillance of our employees' union activities.

WE WILL NOT selectively and disparately enforce any rule concerning solicitation and distribution by prohibiting union-related solicitations and distributions while permitting nonunion-related solicitations and distributions, in order to discourage our employees from supporting the Union or any other labor organization and engaging in concerted activities for their mutual aid or protection.

WE WILL NOT discharge our employees because they join, support, or assist the Union or any other labor organization or because they engage in other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL rescind our rule prohibiting distribution of literature in employee mailboxes.

WE WILL rescind our rule concerning access of our off-duty employees to our property.

WE WILL rescind our disciplinary warnings, including fact-finding memos or oral reminders, issued to employees Carol Awad, Lynn Baker, Janet Courtemanche, Brenda Craft, Jan Hylton, Catherine Meister, Elaine Muller, Tina Price, and Joan Whalen, because they wore buttons in support of the Union.

WE WILL rescind our April 17, 1989 revised personal appearance policy to the extent that it prohibits our employees from wearing insignia on their uniforms in support of the Union or any other labor organization.

WE WILL rescind the disciplinary warnings issued to employees Dorothy Vasilchek, Elaine Muller, and Kathleen Eisenhauer because they leafletted on behalf of the Union.

WE WILL offer Kathryn (Kitty) Richardson immediate and full reinstatement to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, with interest.

WE WILL remove from their files any reference to the unlawful warnings issued to Elaine Muller, Carol Awad, Lynn Baker, Janet Courtemanche, Brenda Craft, Jan Hylton, Catherine Meister, Tina Price, Joan Whalen, Dorothy Vasilchek, and Kathleen Eisenhauer, and the discharge of Kathryn (Kitty) Richardson and notify them in writing that this has been done and that the warnings and discharge, respectively, will not be used against them in any way.

FAIRFAX HOSPITAL, A DIVISION OF INOVA HEALTH SYSTEMS AND FAIRFAX HEALTH SYSTEM, INC.